



February 9, 1999

Ms. Bertha Bailey Whatley
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107-1360

OR99-0403

Dear Ms. Whatley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 122137.

The Fort Worth Independent School District (the "school district") received a request for 47 categories of information. You contend that some of the requested information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed a representative sample of the information at issue.¹

Before considering the specific exceptions you have raised, we will address two general questions you have asked. First, you state that documents with information responsive to categories 44 and 46 of the request do not exist, and you ask whether the school district is required to create documents in order to comply with the request. The Open Records Act does not require a governmental body to obtain or create new information in order to comply with a request for information. Open Records Decision No. 534 (1989). Therefore, the school district is not required to comply with category 44 or category 46 of the request.

Second, you inform us that the school district previously provided the requestor with information responsive to several categories of the request. You ask whether the school

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

district is required to provide the requestor with this information a second time. The fact that the requestor may have previously obtained the information he is seeking does not relieve the school district of its obligation to respond to the pending request. See Gov't Code §§ 552.201-.204. Of course, the school district may, in accordance with the Open Records Act, charge the requestor for the cost of providing him with this information.

The requestor is seeking copies of student infractions and videotape recordings from school district buses. You contend that this information is excepted from disclosure pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. A prior ruling, Open Records Letter No. 98-3216 (1998), answers your question concerning the application of FERPA to copies of student infractions and videotape recordings from school district buses. You may continue to rely upon Open Records Letter No. 98-3216 (enclosed) in regard to this issue.

You contend that the documents responsive to categories 5, 8, 10 and 12 of the request (your fifth confidential enclosure) are excepted from disclosure pursuant to section 552.103 of the Government Code.² Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Having considered your arguments and the submitted information, we find that the school district reasonably anticipates litigation against the requestor's client. We also find that the information in your confidential fifth enclosure is related to the reasonably anticipated litigation. Therefore, you may withhold this information from disclosure pursuant to section 552.103.³

²We note that the school district previously waived its section 552.103 interest in some information relating to the requestor's client. See ORL 98-3216 at 3. We assume that the school district has already released this information to the requestor. This ruling is limited to information for which the school district has not waived its section 552.103 interest.

³Because we conclude that your confidential fifth enclosure is excepted from disclosure pursuant to section 552.103, we do not address your additional arguments against the disclosure of this information.

In reaching this conclusion, however, we assume that the opposing party in the anticipated litigation has not previously had access to the information at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script, reading "Karen Hattaway".

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 122137

Enclosures: Submitted documents; Open Records Letter No. 98-3216 (1998)

cc: Ms. Bobbie Edmonds
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(w/o enclosures)